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No. _____

In The
SUPREME COURT OF THE UNITED STATES

BRET CUMMINS

Petitioner,

v.

PEPSI-COLA COMPANY
LOCAL NO. 12593 UNITED
STEELWORKERS OF AMERICA;
UNITED STEELWORKERS OF
AMERICA, AFL-CIO-CLC

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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53pp

QUESTIONS PRESENTED FOR REVIEW

1. Where given the provisions of the Collective Bargaining Agreement and the interpretive actions of Pepsi and the Union, Cummins could present evidence that Pepsi and the Union discriminated against him by violating national labor laws by forming a Company-Dominated Union, and by blocking his recall from lay-off, when full time work was available, and intentional misinterpretation of the contract, whether the Court below erred in granting defendants summary judgment?

2. Where Cummins could present evidence that Pepsi breached the contract by violating his rights under the employment discrimination statue 42 USCS Section 2000e by blocking his recall and refusing to work him but working non-union men in his place full time in violation of the contract, which was ignored by the lower courts, whether the court below erred in granting defendants summary judgment?

3. Where Cummins could present evidence that the Union refused to pursue his grievances after joining Pepsi in a construction of the contract, contrary to its provisions and to the parties' interpretive conduct, joined Pepsi to contend that the contract had not been breached and by allowing Pepsi to discriminate against him by blocking his recall rights, whether the court below erred in granting defendants summary judgment?

4. Is a claim to time bar Cummins' November and December, 1995 grievances fair, since Pepsi nor the Union had given a verbal or written statement until in June, 1996, that they considered them resolved, after which Cummins filed a timely complaint with NLRB?

STATEMENT REQUIRED BY RULE 29.6

Plaintiff, Bret Cummins, has no parent Company and no nonwholly owned subsidiaries.

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OPINIONS BELOW

On February 18, 1998, the United States District Court Eastern District of Kentucky, Pikeville, made a decision in this case and is included in the appendix at pages 5a - 18a.

On April 30, 1999, the United States Court of Appeals for the Sixth Circuit made a decision in this case and is included in the appendix at pages 1a - 4a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit made a decision in this case on April 30, 1999. A petition for rehearing was not timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The District Court and the Court of Appeals failed to recognize that Cummins had been a victim of employment discrimination as in statute 42 USCS Section 2000e which prohibits discriminatory practices and it is applicable to whites upon the same standards as nonwhites. The lower courts disregarded and made no comment on Cummins' issues of discrimination as sited by:

Vaca v. Sipes 386 U.S. 171, 177 (1967)
O'Neill, 499 U.S. at 67 ; 386 U.S. at 190
Linton v. United Parcel Service, 15F.3d 1365, 1369 (6th Cir. 1994)

The Union must treat all their members in good faith, honesty and equally, *Vaca v. Sipes, supra* and can not favor one employee over another. *Cruz v. Local Union No. 3,* 34F.3d 1148 (2nd Cir. 1994)

STATEMENT OF THE CASE

The District Court, Judge Joseph Hood, Pikeville, Kentucky, made his decision in this case to give defendants, Pepsi-Cola and United Steelworkers of America, Summary Judgment based on false facts presented by Pepsi and the Union, misinterpretation of the CBA by Pepsi and later followed by the Union, which were contrary to the record and the CBA and vicious acts of blazon discrimination, prejudice and malice by blocking Cummins' recall rights by working non-union employees instead of recalling him when full time work was available. The Court of Appeals agreed with Hood.

The record showed that evidence was presented to the lower courts that established that Cummins was discriminated against by Pepsi and the Union later joined them in an effort to prevent Cummins from being recalled back to work. The local Union in their Summary Judgment, that the District Court reviewed, stated that Mike Harris, Hazard plant manager, had stated that Cummins would have to drive to Pikeville and take the job that Pepsi was offering or "quit". The lower courts ignored the facts that Cummins was the only employee affected by the proposed consolidation that was mandated to do this, everyone else was provided transportation to ease expenses. They also state in their Summary Judgment that at the June 12, 1996 grievance meeting that Mike Harris had thrown Cummins' grievance in the trash and stated that "Pepsi didn't have any obligation to him", but that Thompson had reminded Harris that Pepsi was obligated to Cummins because he had recall rights. Also, in his testimony, Union Steward Bryan Grubb supports the fact that Cummins was discriminated against by Pepsi in stating that Harris had told him when he asked about whether Pepsi was going to recall Cummins back to work full time ,after the

June 12, 1996 meeting was over, and Harris replied, "I am not going to hire Bret Cummins". These statements have not been disputed, but rather elaborated and flaunted in front of the lower courts. The lower courts failed to recognize that Cummins had been treated unfairly because Pepsi had been in violation of national labor laws by restraining Cummins from recall by misinterpretation of the CBA, and by forming a Company-Dominated Union and the Union failed to fairly represent Cummins by joining with Pepsi and helping to restrain Cummins from recall by evading their duty by allowing Pepsi to discriminate against him.

The Reorganization and Cummins' Layoff in December 1995

Bret Cummins worked at defendant Pepsi-Cola Company in Hazard, Kentucky. In late November Pepsi wanted to consolidate the three existing vending departments in Hazard, Paintsville and Pikeville and consolidate the three separate seniority lists into one consolidated list. Thompson had not discussed the pending consolidation with Pepsi nor its effect on workers including Cummins. (Thompson Dep., p. 22, Apx.__). Instead of talking with the Union about their proposed plan, as stipulated in the Collective Bargaining Agreement, (CBA), Pepsi mandated that all employees start the consolidation process by bidding on jobs under a consolidated seniority list from all three departments at the objection of the workers and numerous filed grievances. According to the CBA, Article XXV, Complete Contract, states:

> The provisions of this agreement can be amended, supplemented, rescinded or otherwise altered only by mutual agreement in writing signed by the parties hereto.

Cummins, along with two co-workers in the vending department at Hazard filed a grievance stating that the forced consolidation was a violation of the CBA since the CBA clearly states Separate Seniority Lists for each location and the existing CBA under which they were working did not expire until in February, 1996. Article IV, Section 4 stipulates Separate Seniority Lists. The Court of Appeals upheld Pepsi's explanation that they chose to keep the Separate Seniority List provision in the new CBA because if they wanted to have separate lists in the future they could. This is contrary to the language of the CBA. A provision should not remain in a contract that is presumed void and without meaning. If Pepsi is allowed to maintain a provision in their CBA that is void and without meaning, they could change or manipulate this provision whenever an unfair labor claim or grievance came up in order to protect themselves. This would be unprofessional and unethical to their workers besides, against the law.

The District Court stated that Union Representative Ernest Thompson, at the December 5, 1995 grievance meeting for Cummins argued that Pepsi had violated the CBA, but Pepsi alleged that the Union's interpretation of the contract was wrong but agreed to deal with the issues of Cummins' seniority rights and his unequal treatment during the pending consolidation, in negotiations of the new CBA. (Memorandum Opinion and Order, p. 2, Apx.__). By now, Cummins was asked to give up his job as a Service Tech and give it to a senior employee who had more seniority but lacked technical training in refrigeration and also lacked the EPA certification to work on refrigeration equipment legally. Cummins didn't file a grievance but told Pepsi and the Union that according to the CBA Article IV, Section 1:

> It is agreed that the Company recognizes the seniority rights of all members of the Union employed by the Company. All layoff, recalls, transfers, promotions and overtime selection shall be based on qualifications. Among qualified employees, seniority shall apply. ..

Pepsi wavered the federal law restriction and gave the job to Manuel Arnett assuming that he could become certified latter and disregarding his inability to perform the complete job due to deficiencies in training. (Memorandum Opinion and Order, P. 4, Apx.__). However, the Union and Pepsi made a verbal agreement with Cummins that if Arnett was incapable of doing the refrigeration part of the job, they would put him back to his job as Service Tech. By now the proposed, unorganized consolidation had displaced Cummins from his job and now Pepsi mandated that he transfer to Pikeville and lose seniority rights and status and drive his own vehicle at his own expense or "quit". (Motion for Summary Judgment, Pepsi, p. 6, Apx.__). Everyone else affected by the consolidation was provided transportation to help ease the expenses of commute and none were treated unequal like Cummins and given this ultimatum. At this time Cummins told Harris that he could not afford the expenses of driving his own vehicle and he asked Harris if he could have one of the Associates' jobs since at the time of Cummins' layoff, Pepsi had two Associate employees working. According to the CBA, Harris should have given Cummins one of these jobs but Harris refused and told Cummins there were no openings. (Harris Dep., p. 13, Apx.__). Because of these unfair circumstances surrounding Cummins' job displacement, Thompson negotiated him a conditional, temporary lay-off until his issues of seniority rights and unequal treatment could be resolved through negotiations.

Controversy Over Consolidation

Thompson had not discussed the pending consolidation with Pepsi at the time of the December 5, 1996 grievance meeting for Cummins nor how it was displacing Cummins by acts of discrimination. (Thompson Dep., p. 22, Apx.__). Thompson testified that he had not seen any documents to verify that Pepsi had actually consolidated. (Thompson Dep. 21, Apx.__). He also gave contradicting statements in his deposition that he did not know for a fact that the seniority lists had been consolidated into one seniority list. (Thompson Dep., p. 55, Apx.__). This is contrary to their entire case and supports Cummins' allegations that the seniority lists had not been combined. Evidence was presented to the lower courts that supported these facts. The District Court took Pepsi's word that they had consolidated. The Court of Appeals stated that they made their determination because Cummins had stated that Pepsi had consolidated. When asked by opposing counsel if Pepsi had consolidated, Cummins said yes based on the assumption of what he had been told by Pepsi that the proposed consolidation had actually happened. Cummins did not had any personal knowledge of whether they consolidated.

Cummins' November and December Grievances

Thompson failed to answer Cummins' November grievance but keep verbally promising that he was trying to get things worked out so he could be called back to work. In late December Cummins saw men from Pikeville doing part of Arnett's job, he filed another grievance stating that Pepsi was bringing men into Hazard and doing work that he should have been recalled to do. Another worker from Hazard that had

been effected by the proposed consolidation, Terry Isaac's, filed a grievance in support of Cummins' and can be presented as evidence. Pepsi failed to answer the grievance and the Union, Thompson, said he would address it in during contract negotiations. Pepsi and the Union rejected Cummins' grievances and restrained him from recall by working men from different locations, to do the work Arnett was incapable of doing, before the seniority issues had been resolved and on the pretense that the Union was trying to get Cummins back to work. Pepsi also blocked Cummins' recall to employment by misinterpretation of the CBA. Pepsi and the Union bitterly denied that Cummins had filed a grievance in December after litigation started. (Thompson Dep., p. 27, Apx.__). However in his response to the NLRB, Union Representative Thompson elaborated on details of Cummins' grievance and stated to the NLRB that the use of employees from Pikeville had only been on a temporary basis and therefore had not violated the CBA. (Cummins Dep., Exhibit 8, Apx.__). These statements presented in this letter by the NLRB, Exhibit 8, were statements presented by Thompson under affidavit that helped the NLRB determine whether Cummins had been treated unfairly or discriminated against by Pepsi. Now, after the fact, Thompson had joined with Pepsi in a collusion, or cover up, and has retracted most of the statements that he presented to the NLRB under affidavit as facts and have changed them to denials. This supports the fact that Pepsi treated Cummins unequal to other employees before and after his lay-off, and the Union later joined Pepsi in an attempt to prevent the lower courts from acknowledging that Pepsi and the Union had violated the CBA by misinterpretative actions that were considered discriminatory in nature and prejudice and malicious by conduct in an attempt to prevent his recall rights.

Thompson's Contradictive Statements

Thompson could not have made a determination not to pursue Cummins'grievance #62 any further with good will and honesty, as he alleges, of whether Cummins was being discriminated against or whether his seniority rights had been violated, if he did not know for a fact whether or not the seniority lists had been consolidated or whether or not Pepsi had actually consolidated. Thompson stated to the NLRB that Pepsi had consolidated. After the fact, he stated in his deposition that he did not know for a fact if they had actually consolidated. These contradictive statements were pointed out to the District Court, and to the Appeals Court, but were ignored.

The District Court also overlooked the fact that the local Union in their Motion for Summary Judgment state that Thompson at the February 10, 1996 Union meeting told the union members that Pepsi was going through with the consolidation and that he had determined that the consolidation would not erode the bargaining unit or discriminate against any one person (Cummins).He also stated that he was trying to get Cummins back to work. (Union Motion for Summary Judgment, p. 8, Apx.__). The District Court wanted to determine that Cummins November and December grievances be time-barred because Pepsi and the Union alleged that Cummins knew in February, 1996 that Thompson was not going to pursue his grievances any further. Facts were presented to the court that Thompson had denied Cummins' November and December grievances but to the National Labor Relations Board (NLRB) he had elaborated on how he had partially resolved them with the "bridged" seniority clause in the new CBA. Based on statements that were presented under affidavit, the NLRB

concluded that Thompson had answered Cummins November and December grievances. The lower Court stated that Pepsi and the Union had denied ever receiving the complaint, therefore, ignoring its merits. (Memorandum and Opinion, p. 3, Apx.__). Thompson also stated to the NLRB that he had notified Cummins on February 17, when the contract was voted on, and again on June 12, 1996 that he had resolved Cummins'grievances with the "bridged" seniority. (Thompson Dep., Exhibit 12, Apx.__). The District Court overlooked the fact that Cummins did not attend the February 17 meeting and the Union criticized him for it. (Motion for summary judgment local union, p. 8,9, Apx.__). Cummins did not find out about "bridged" seniority until June 12, 1996 when other union members told him they had just gotten their seniority back. Thompson stated to the NLRB that the new CBA did not go into effect until in April 1996. (Cummins Dep. for union, Exhibit 8, Apx.__). The District Court overlooked these false statements that were made by Union which were proven to be untrue.

Cummins had filed a complaint with the NLRB in July once he found out that Thompson and Pepsi were not going to answer his grievances nor keep their promises to recall him back to work even though they had discriminated against him during the pending Consolidation and laid him off until issues related to the consolidation could be worked out for him. The Union stated in their Summary Judgment that all of Cummins' grievances and their duty toward Cummins during the contract negotiations should be time-barred. (Motion for summary judgment, local union p. 15, Apx.__). The NLRB did not reach their decision until in October, 1996 and Cummins could not file his lawsuit until they released his case. He filed case November 1996.

June 12, 1996 Grievance Meeting

In May, 1995, Cummins filed another grievance since he still had not been recalled back to work and he saw Larry Damrell, from Pikeville, doing Arnett's job in Hazard and spoke with him. Also, Supervisors and Associates[non-union] were doing work on a daily basis in Hazard. However, the District Court decided that Pepsi, had not violated the CBA by working supervisors and associate employees [non-union] since Pepsi said it was on a sporadic basis. (Memorandum Opinion and Order, p. 4, Apx.__). Evidence was presented to the Court that Union Steward Bryan Grubb and other union members at the June 12, 1996 meeting had established that full time work was available since Pepsi had agreed to stop working supervisors and Associate employees with Cummins on lay-off which was a violation of the CBA. (Grubb Dep., p. 38, Apx.__).

Article XVI, Section 11 states:

> The Company may use associates in the off-season due to unexpected absences. Associate employees will not be used when any regular full time employees are on lay-off.

Thompson stated that Pepsi should recall Cummins on a full time basis since it was established that full time work was available. In the Union's Motion for Summary Judgment, they state that Thompson demanded that Pepsi recall Cummins on a full time basis but Pepsi refused and would not commit to recalling Cummins on a full time basis but agreed to recall him on a sporadic type basis. (Motion for Summary Judgment, local Union, p. 11, Apx.__). Cummins and Grubb testified that Thompson did not agree to sporadic type work

since full time work was established and he refused it, not Cummins. The District Court ignored the facts presented by Union Steward Grubb, that he said could be collaborated by other union members at the meeting, that Pepsi was working Supervisors and associate workers on a full time basis. The District Court and the Court of Appeals overlooked the fact that the Union supported Grubb's and Cummins' testimony. Evidence could be presented that Pepsi has not ceased to this day of working associates in union jobs as they were doing when Cummins filed his grievance #62.

The District Court claims that Cummins backed off of this issue that the CBA had been violated by Pepsi working associate employees with Cummins on lay-off, which is not the case. Cummins' initial complaint stressed this fact. Also, the Court of Appeals states that Cummins did not address the issue of new hires, however overlooked the fact that the record clearly stated that Supervisors and Associates were regularly doing work that Cummins should have been recalled to do, as Pepsi conceded and the court below correctly remarked. There was substantial refrigeration work that Arnett could not do plus additional work that was being done by Supervisors and Associates.(Proof Brief for Appellant, p. 32, Apx.__).

<u>The Transfer of Arnett and Damrell Due to Arnett's Deficiencies</u>

The District Court also upheld the fact that the transfer of Arnett and Damrell had not been a violation the CBA since they were in the same department. He also upheld the fact the Arnett needed EPA certification to perform his job but overlooked the fact that EPA certification had been a job

criteria since 1992. He was also aware that Arnett had not received any training in Pikeville toward his certification as the Union had alleged in their response to the NLRB nor the fact that Arnett had been removed from his job due to job deficiencies. They also failed to recognize evidence presented that Arnett had filed a grievance to the effect that he was not receiving any training toward his certification and demanded to be transferred back to Hazard. Cummins pointed out to the Appeals Court that Arnett had been removed from his job because of deficiencies and therefore a vacancy was created. However Thompson alleged they were transferred so Arnett could receive training. Since that was not the case and since the union grieved on Arnett's behalf, Thompson could not reasonably rest on this as a basis for his decision not to pursue Cummins' grievance any further. Thompson's decision on these grounds goes well beyond the bounds of good faith and reasonableness. The District Court completely overlooked the fact of whether or not Pepsi, by giving Arnett the job over Cummins, knowing that he lacked EPA certification and refrigeration training skills, was in violation of the Clean Air Act plus discriminating against Cummins by ignoring the qualification provision of the CBA that stated qualifications supersede seniority when transfers were involved. The District Court also criticized Cummins for not providing information as to whether or not Pepsi was in compliance with EPA laws or whether or not additional training was needed for their Service Techs. (Memorandum Opinion and Order, p. 6, Apx.__). The District Court ignored the fact that Pepsi was violating the federal Clean Air Act by allowing Arnett to work, yet they held Cummins accountable for not providing Pepsi with information they should have already known and been using. The District Court had overlooked the fact that Cummins did not refuse to provide this information, Cummins did not have this information in his

possession but was trying to obtain it from the EPA. Whenever Cummins called Thompson on June 28, 1996, Thompson asked him if he had gotten the information and Cummins said "no" but that he was expecting it any day. Pepsi and the Union made false statements that Cummins refused to give them this information under advise of counsel. Cummins did not have counsel which can be proven by correspondence with NLRB. Thompson told Cummins he was not going to pursue his May grievance and Cummins asked him for a written answer from him and Pepsi to his grievances.

The Court of Appeals overlooked the fact that Arnett was removed from his job and assigned in Pikeville in violation of the Temporary Transfer provision unless he had been permanently transferred, a jury could find that a vacancy was created in Hazard. Since Cummins retained contractual rights to recalled from layoff to that vacant position, the court below erred in concluding that Pepsi had not breached the CBA in failing to recall Cummins.

The District Court acknowledges the fact that Thompson sent Cummins the letter in response to his grievance but on the issue of whether additional training, besides the EPA card, was needed to perform refrigeration work and that Thompson had made a good faith determination not to take Cummins' case to arbritation. (Memorandum Opinion and Order, p. 6, Apx.__). The District Court neglected to recognize that this letter was the only answer that Cummins had received to his entire grievance. The Court took Pepsi's word that they had answered Cummins' entire grievance when they had no evidence from Pepsi to support this allegation, but had facts to the contrary.

Pepsi Offers Cummins Job But Union Gives It To Damrell

Also, in June, 1997, Cummins received a letter from Kevin McDonald, Pikeville Manager, and was offered a job as a Service Tech. Cummins did accept the job. McDonald later called him and told him he could not have the job. The union intervened and caused Pepsi to rescind the offer and it was awarded to another employee, Larry Damrell, who has less seniority than Cummins. The Union alleged that Darmell was an "active" employee and Cummins is "inactive". The CBA does not contain any language about "active" or "inactive" employees involving recall rights or vacant positions. Pepsi and the Union added this interpretation to the contract when Cummins accepted the job. Not only was this discrimination, this was done with prejudice and malice intentionally to humiliate Cummins. Mike Harris, plant manager at Hazard, testified that he and McDonald discussed the job before it was offered to Cummins. (Harris Dep., p. 36,37, Apx.__). The District Court took Pepsi's word that the CBA language indicated "active" or "inactive:" employee when counsel for Cummins argued that such language didn't exist in the CBA.

The District Court also overlooked the fact that Pepsi and the Union had from July to November, 1996, to get their facts together to try to cover up any violations that Cummins had accused them of since the NLRB had informed Cummins to write Pepsi and the Union and describe all of his concerns and the ways in which Pepsi and the Union had not treated him equal to the other employees. With this information in their possession, they portrayed Cummins as a ruthless, ungrateful employee who didn't have any morals who wanted the top position at Hazard but who had the least seniority. With this

information in hand, they formed a collusion and Thompson has retracted and contradicted statements that he signed under affidavit and under penalty of perjury to the NLRB and now, after the fact, have come up with different statements than his original in order to get the Court to dismiss this case and have used the NLRB decision to support the fact that Pepsi nor the Union breached the CBA in connection with Cummins.

Pepsi failed to keep their verbal agreement with Cummins that they would work out his issues of seniority and recall rights and put him back to work as soon as the negotiations of the new CBA were complete. They failed to work out a ride for Cummins but alleged to the lower courts that he refused to ride with a co-worker. Pepsi representatives testified and evidence was presented that the ride would not work out because of conflicting schedules.

Evidence was presented to the lower courts that Pepsi had tried to consolidate before given approval by the Union, it was a known fact that Pepsi had already violated the CBA by working non-union and management employees and men from other locations, with Cummins on lay-off and discriminating against him by working these men and blocking his recall to employment. The union failed to fairly represent Cummins by joining Pepsi in misinterpreting the CBA and by their discriminatory actions that restrained and prevented his recall to employment, and thus displaced him.

Cummins proved to the District Court that Pepsi had violated the CBA by discriminating against him by treating him unequal to other employees affected by the consolidation. Secondly, Pepsi had violated the CBA by not discussing the proposed consolidation with the Union before they mandated that Cummins lose seniority rank and drive to Pikeville or "quit". Evidence was submitted that supported the fact that Thompson testified that he did not know anything about the proposed consolidation until he was informed by Cummins. It was further proven by the Union that Thompson had not accepted the consolidation of Pepsi until in February, 1996, when he told Union Members at the meeting that he had determined that the consolidation would not erode the bargaining unit and he was trying to get Cummins back to work. Pepsi and the Union alleges that the consolidation had already taken place when Cummins was laid off, which was not true, and is support by this statement from Thompson. Also the memo submitted by McDonald that had the proposed consolidation plans had a date of December 15, 1995, which proves the consolidation was not worked out at this time. Also, by this time, Cummins' November and December grievances were still unanswered and Cummins was being blocked by Pepsi and the Union from recall by misinterpretation of the CBA and denying him treatment and representation equal to other employees.

Also Cummins proved to the District Court that associate employees [non-union] , had been doing union jobs with Cummins on lay-off. Pepsi admitted they had violated the CBA by working these non-union employees on a full time basis but only agreed to recall Cummins on a sporadic type basis which showed prejudice and discrimination toward Cummins. The District Court admitted that Pepsi had violated

the CBA by working supervisors and associate workers with Cummins on lay-off , but failed to take any action on Cummins' behalf.

The District Court had overlooked the fact that new hires had been made at the Hazard plant. During the month of March 1997, Cummins was offered to bid on sporadic type employment. Cummins didn't apply for the job on advise of counsel that litigation had already started and with sporadic work he would lose all of his benefits and seniority, therefore being unacceptable. Mike Harris, Hazard plant manager, hired an employee on lay-off, with less seniority, on a full time basis but had only offered the job to Cummins on a sporadic type basis, giving Cummins the same treatment, denial of full time work, as the June 12, 1996 meeting. This clearly shows discrimination and it shows the fact that Pepsi flatly refused to recall Cummins on a full time basis. Also, he had hired two associate employees on a full time basis around the June 12, 1996 meeting which Cummins had informed Thompson, who told him to take it up with management.

Overall, the District Court has admitted in their Memorandum and Opinion that Pepsi had violated the CBA by working Supervisors and associate employees with Cummins on lay-off, the Court admitted that it was all right for Pepsi to determine qualifications of their employers, even if it meant violating Federal laws, the Court has admitted that Pepsi could allege that the Union had misinterpreted the language of the CBA, and Pepsi hadn't, so therefore, it was acceptable. Also, the District Court reviewed the facts in this case and accepted the fact that Cummins was constantly denied recall, his seniority rights ignored, qualifications ignored, even though they had reviewed evidence that supported Cummins' claim by a union steward and

collaborated by union members that Cummins' recall and seniority rights were violated.

Taking all of the evidence into consideration, the District Court ignored the fact that Summary Judgment is granted when "no genuine issue" can be contradicted at trial. Evidence was presented that a reasonable jury could have made a determination after examining all of the facts presented by Pepsi and Cummins. The District Court erred in granting Summary Judgment.

The Court of Appeals upheld the decisions of the District Court based on the facts that the lower court had determined, such as the fact that Pepsi had consolidated when evidence was presented that they hadn't. They also based their decision on the lower courts conclusion that no new hires had been made. Associate employees had been hired and Pepsi had admitted that they had violated the CBA by working associates and Supervisors [non-union] with Cummins on lay-off. The Court of Appeals erred and failed to recognize that fact that Cummins had been a victim of discrimination. Accordingly, the judgment of the court below should be reversed and this case remanded for trial.

ARGUMENT

Former counsel for Cummins, Robert Abell had used these laws to support Cummins' case:

> Cummins' action under section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. Section 185, requires both a finding of a breach of a collective bargaining agreement by the employer and a breach of the duty of fair representation by the Union. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558 (1990); *Linton v. United Parcel Service,*15 F.3d 1365, 1369 (6th Cir. 1994).

The interpretation of a collective bargaining agreement is a question of law which this court reviews *de novo. Linton,* 15 F.3d at 1370. Basic principles of contractual interpretation are applicable to collective bargaining agreement. *International Union, United Auto, Aerospace and Agr. Implement workers of America (UAW) v. Yard -Man, Inc.* , 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied,* 465 U.S. 1007 (1984). While "the court should first look to the explicit language of the collective bargaining agreement for clear manifestation of intent, "*Yard-Man, supra,* "[t]he intended meaning of even the most explicit language can, of course, only be understood in the contest which gave rise to its inclusion, "*"Id.; see Randall v. Lodge no.* 1076, 648 F.2d 462 (7th Cir. 1981); *Cronin v. Sears Roebuck & Co.,* 588 F.2d 616 (8th Cir. 1978); *Cappa v. Wiseman,* 469 F. Supp. 437 (N.D. Cal. 1979), *aff'd,* 659 F. 2d 957 (9th Cir. 1981); *see also Bache v. AT & T,* 840 F.2d 283, 291 (5th Cir.), *cert. denied,* 488 U.S. 888 (1988)("the terms of a

collective bargaining agreement consist of not only its written provisions but oral and written amendments, the conduct of the parties, the industrial common law, and the results of the interpretive of the integrated whole." *Yard-Man,* 716 F.2d at 1479. "As in all contracts, the collective bargaining agreement is a question of law, the issue of whether an employer has breached a collective bargaining agreement may be committed to the jury. *Vadakin, Inc. v. International Brotherhood of Boilermakers,* 748 F.Supp. 550, 553, (S.D. Ohio 1990).

The only construction of the CBA which gives meaning to all the relevant provisions, is consistent with the parties' conduct and interpretive actions at the time and best serves the interests of federal labor law is that Cummins' retained contractual rights in his employment in Hazard, or what Grubb, the union steward, called "territorial rights." The record indicates that a jury could find that a vacancy was created triggering Cummins' recall rights when Arnett was disqualified from the refrigeration technician position in Hazard.

Cummins was laid off from the Hazard plant and his notice was signed by Harris, whose authority extended only to employees of the Hazard plant .(Harris Dep., p. 8, Apx.__). If Cummins was, by virtue of the "consolidation", an employee of a single Pikeville department, Harris would have no authority to take any action regarding his employment status. This court has observed that actions by the parties demonstrating their interpretation of the CBA prior to the onset of litigation should be credited. *see Bagsby v. Lewis Bros., Inc. of Tennessee,* 820 F.2d 799, 802 (6th Cir. 1987). That Harris did possess and exercise such

authority evidences Pepsi's recognition that Cummins' status remained rooted in the Hazard plant.

Grubb's representation of Cummins' grievance in May 1996 is the union's indication that it considered him to retain contractual status and rights as a Hazard employee. That Pepsi recognized the contractual imperative to respond to the grievance and Thompson to pursue it is an indication from both that Grubb acted on behalf of an employee with employment status rooted in the Hazard plant. The actions of both Pepsi and the union recognized that Cummins had status as a Hazard employee. *Bagsby, supra.*

Pepsi's position that the Temporary Transfer provision of the CBA did not apply to the Arnett-Damrell transfers cannot be sustained. The basis for Arnett's grievance was the change in location of his workplace when the supposed "training" was not forthcoming. That the Union pursued the grievance and Pepsi acceded to it evidences their interpretation that the provision imposes a one-week transfer of location restriction. *Bagsby, supra.* Moreover, the parties conduct recognizing a contractual rights distinction for Hazard employees and those from the other location further undermines the court below's conclusion that only one vending department located in Pikeville existed for contractual purposes after the consolidation. A reasonable jury could certainly find that Pepsi did not willingly place an unqualified employee back in a position at which he had already failed and at which he could not lawfully perform.

The conclusion of the court below that no vacancy was created in Hazard by Arnett's removal to Pikeville cannot be sustained. First the conclusion rested on the finding that the

December 1995 "consolidation" terminated all contractual status and rights that Cummins retained at the Hazard plant. That finding is contrary to the contractual language and the parties' interpretive conduct. Second, the court below did not consider the allegations of Pepsi and the Union that no vacancy was created because Arnett was receiving "training" in Pikeville. A reasonable jury could find that Arnett received no "training" and that a vacancy was created in Hazard to which Cummins should have been recalled from layoff. It is undisputed that not only was Arnett not receiving training but this is the reason he grieved his transfer to Pikeville. (Grubb Dep. p. 30-31, Apx.__). A reasonable jury could find Pepsi's and the union's contention that no vacancy was created to be false and pretextual. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)(a jury issue is created when an explanation for an employment action is shown to have no basis in fact).

Also, a reasonable jury could find that Arnett was disqualified from the position, because he lacked the required EPA certification. McDonald's July 18, 1996, memo indicates that Arnett was not getting the job done even with respect to matters not pertaining to certification. (McDonald Dep. Exhibit 5. Apx.__). The record establishes that management personnel and non-union employees (associates) were doing work on a regular basis that Cummins should have been recalled to do, as Pepsi conceded and the court below correctly remarked. Therefore, since Arnett couldn't perform the job, a reasonable jury could find that a vacancy was created in Hazard. Since Cummins retained contractual rights to be recalled from layoff to that vacant position, the court below erred in concluding that Pepsi did not breach the CBA in failing to recall Cummins.

A union has a duty fiduciary in nature to represent its members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid discriminatory conduct. Cummins could present evidence at trial that the union refused to pursue his grievances after joining Pepsi in a construction of the CBA contrary to its provisions and the parties' interpretive conduct, further joining Pepsi in a false factual assertion to contend that the CBA was not breached, after accepting Pepsi's rejection of the grievances on grounds known to be false, and affording Cummins representation unequal to that afforded other employees. A jury could find that the union breached its duty to Cummins.

A union's duty to fairly represent its employee-members is fiduciary in nature; "a union owes employees a duty to represent them adequately as well as honestly and in good faith." *Air Line Pilots v. O'Neill,* 499 U.S. 65, 74-75 (1991). The union's duty "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid a discriminatory conduct. "*Vaca v. Sipes,* 386 U.S. 171, 177 (1967)

A breach of a union's statutory duty of fair representation occurs where a union's conduct toward a member is arbitrary, discriminatory or in bad faith. O'Neill, 499 U.S. at 67; *Vaca,* 386 U. S. at 190; *Linton v. United Parcel Service,* 15 F.3d 1365, 1369 (6th Cir. 1994).

Thus, on one hand the Union acknowledges Cummins' continuing contractual status as a Hazard employee and Grubb represent his grievance while, on the other hand,

joining--when it becomes convenient to do after the onset of litigation--Pepsi's contentions that Cummins retained no such status. Notably, Thompson did not advance this position in any of the three statements to the NLRB and his after-the-fact assertions later made cannot be used to justify his decision. *See Bagsby, 820 F.2d at 802; See also Thurman v Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1167(6th Cir. 1996)(remarking that a changing rationale for employment decision can be evidence of pretext). The union's duty to represent Cummins cannot be discharged by joining the after-the-fact CBA interpretation proffered by Pepsi. *See Linton,* 15 F.3d at 1372. Nor can after-the-fact reliance on a CBA construction inconsistent with the Union's prior interpretive conduct be considered other than arbitrary. *Poole,* 706 F.2d at 183; *Ruzicka II,* 649 F.2d at 1211 n.3 Second, Cummins can present evidence that Thompson's contention that no vacancy triggering Cummins recall was created by Arnett's removal to Pikeville because Arnett was there receiving training was known by Thompson to be untrue. A reason that is false cannot be relied upon to justify Thompson's decision; a reason known to be false is the epitome of whim, caprice, arbitrariness and bad faith. As the Supreme Court has observed, arbitrariness occurs when the machinery of the representation process has not acted with some minimal level of integrity. *Hines v. Anchor Motor Freight,* 424 U.S. 554, 571 (1976). Surely this minimal level is not attained when company and union knowingly coalesce around a false reason to reject the merits of an employee's grievance. Third, Cummins can present evidence at trial demonstrating that Pepsi's assertion in its written rejection of Cummins' grievance that all of its refrigeration technicians, including Arnett, were duly qualified and certified was know to be false by Pepsi and by Thompson. Fourth, Cummins can present evidence at trial that the union afforded him unequal

representation than he did other union members. "[A] failure to accord a member the same treatment given to all other members might very well constitute a breach of the union's duty of fair representation this creating a jury question on this issue." *Linton,* 15 F.3d at 1373, *citing Bennett v. Local Union No. 66, Glass Workers Int'l union,* 958 F.2d 1429, 1436-39 (7th Cir. 1992); *Bond v. Local Union* 823,*International Brotherhood of Teamsters,* 521 F.2d 5, 9 (8th Cir. 1975). Although Arnett was admittedly unqualified for the job that he assembled from Cummins, proved incapable of performing it adequately and was disqualified, the union has elected to stand behind the utter falsehood that Arnett was getting training during the transfer and was not disqualified. A jury could find that this explanation for the union's inaction to evidence bad faith and that the unequal treatment given Cummins is a breach of the union's duty to him. *Linton, supra.* The court below's judgment should be REVERSED and this case REMANDED for trial.

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant certiorari in this case because the United States Court of Appeals and the United States District Court have both made a decision on an important federal question in a way that conflicts with relevant decisions of this Court. The lower Courts erred in that they failed to recognize that Pepsi was violating the federal Clean Air Act by displacing Cummins from a job for which he was qualified and certified and putting another employee in that job which lacked EPA certification to work on refrigeration equipment legally, and who lacked refrigeration training, which made him more apt to violate the admissions of freon into the atmosphere, and who was by Pepsi's own standards "unqualified" for the job.

In the past the Supreme Court has recognized that employment discrimination, statute 42 USCS Section 2000e prohibits discriminatory practices and it is applicable to whites upon the same standards as nonwhites. Evidence was presented to the lower courts that Cummins was restrained from recall to employment by Pepsi discriminating against him by blocking his recall by working non-union workers and supervisors, and employees from other locations instead of him. Also, whenever a job was offered by Pepsi, it was taken away by the union in favor of another employee who had less seniority. Also, Pepsi and the Union incorporated language into the CBA which was untrue in order to block his recall. The

lower courts failed to recognize that Cummins had been discriminated against by his employer violating national labor laws that prohibited the formation of a Company-Dominated Union. Evidence was presented to the lower courts that Pepsi and the union had formed a collusion, after the fact, and had intentionally misinterpreted the language of the CBA in an effort to block Cummins from recall to employment.

This issue should be addressed to help other young people deal with job discrimination and the emotional drawbacks of being rejected from a job because the company does not like you or favors another employee other than you, and their actions have nothing to do with whether you are qualified for the job.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfullly submitted,

Bret Cummins
Bret Cummins

Date: Aug. 16, 1999

APPENDIX

No. 98-5395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRET CUMMINS,

PLAINTIFF-APPELLANT,

V.

PEPSI-COLA COMPANY; LOCAL UNION NO. 12593, UNITED STEELWORKERS OF AMERICA; AND UNITED STEELWORKERS OF AMERICA, ALF-CIO-CLC,

DEFENDANTS-APPELLEES

Appeal From The United States District Court
Eastern District of Kentucky
[Hon. Joseph M. Hood, U.S. District Judge]

BEFORE:
KEITH, MERRITT, and DAUGHTREY
Circuit Judges

NOT RECOMMENDED FOR PUBLICATION

No. 98-5395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRET CUMMINS,

Plaintiff-Appellant,

v.

PEPSI-COLA COMPANY; LOCAL UNION NO. 12593, UNITED STEELWORKERS OF AMERICA; AND UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Defendants-Appellees.

BEFORE: KEITH, MERRITT, AND DAUGHTREY, Circuit Judges.

PER CURIAM. In a claim brought pursuant to 301 of the Labor Management Relations Act, 29 U.S.C. 185, Bret Cummins, a laid-off employee of the Pepsi-Cola Company contends that Pepsi violated the terms of a collective bargaining agreement by failing to recall him to work when a vending department service technician who replaced him was temporarily transferred to another post. Furthermore, Cummins argues that the United Steelworkers of America, the union representing Pepsi service technicians at Kentucky plants located in Hazard, Paintsville, and Pikeville,

breached its duty of fair representation by accepting the company's explanation for its actions and by not pursuing Cummins' claims to arbitration. The district court granted summary judgment to the defendant company and union, finding that the collective bargaining agreement did not require recall under the circumstances presented in this matter and that the union properly discharged its representative duties.

In contesting the propriety of the district court's conclusions, Cummins focuses upon his belief that his recall was mandated by the retention in the collective bargaining agreement of site-specific seniority lists for technician positions. The record before this court, however, makes clear that the vending departments at the eastern Kentucky facilities were combined and the seniority lists consolidated. In fact, even the plaintiff himself admitted the consolidation during deposition testimony. Moreover, other evidence before the district court explained that the language requiring separate seniority listings was retained in a collective bargaining agreement negotiated *after* the departmental consolidation only in case Pepsi decided later that it would be advantageous to reestablish separate vending departments throughout the district.

Having determined that consolidation of the various vending departments had indeed occurred, the district court properly concluded that the explicit language of the relevant collective bargaining agreement permitted the company to transfer a less senior employee into Cummins's former job on a "temporary" basis while a senior technician received required training. As noted by the court, the recall provisions of the agreement giving preference to laid-off workers were applicable only if "new hires" were made in the department.

Because no such new hires were implicated in the assignments at issue in this mater, the plaintiff was not subject to recall.

In order to sustain a claim in a hybrid 301 action, the plaintiff must show both that the company breached the collective bargaining agreement and that the union failed adequately to represent him. Because Cummins was unable to show one of these requirements, much less both of them, his claim failed as a matter of law. It follows that the district court appropriately granted summary judgment to the company and the union.

Having had the benefit of oral argument, and having studied the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in dismissing the complaint. Because the reasons why judgment should be entered for defendants have been fully articulated by the district court, the issuance of a detailed opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we **AFFIRM** the judgment of the district court upon the reasoning set out by that court in its Memorandum Opinion and Order filed February 18, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 96-382

BRET CUMMINS,

PLAINTIFF,

V.

PEPSI-COLA COMPANY, UNITED STEELWORKERS OF AMERICA, AND UNITED STEELWORKERS OF AMERICA UNION LOCAL NO. 12593,

DEFENDANT.

BEFORE: JOSEPH M. HOOD, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 96-382

BRET CUMMINS, PLAINTIFF,

V. **MEMORANDUM OPINION AND ORDER**

PEPSI-COLA COMPANY, UNITED STEELWORKERS OF AMERICA, AND UNITED STEELWORKERS OF AMERICA UNION LOCAL NO. 12593,

DEFENDANT

* * * * * * * * * * * * * * * * * * *

This plaintiff, Bret Cummins ("Cummins"), brings this action pursuant to 29 U.S.C. 185, arguing that the defendant, Pepsi-Cola Company ("Pepsi-Cola"), violated the collective bargaining agreement, and the defendants, United Steelworkers of America and United Steelworkers of America Union Local 12593 (hereinafter collectively referred to as "the Union"), breached their duties of fair representation. The defendants have responded, denying the allegations and moving the Court for summary judgment.

Being fully briefed, this matter is now ripe for decision. Having reviewed the record and the parties' memoranda, the Court finds that the defendants are entitled to judgment as a

matter of law. Accordingly, having so found, the court makes the following findings of fact and conclusions of law consistent with such determination.

FACTUAL BACKGROUND

The plaintiff, Cummins, was employed by the defendant, Pepsi-Cola, as a vending technician/refrigeration mechanic in Pepsi-Cola's Hazard, Kentucky facility. In November of 1995, Pepsi-Cola decided to consolidate its Hazard, Paintsville and Pikeville, Kentucky vending departments, locating the newly created vending department, now referred to as the "Marketing, Equipment and Maintenance" ("MEM") department, to the Pikeville location.

This decision resulted in the merging of the seniority lists of the three vending departments. The merger also resulted in the displacement of certain jobs. In creating the MEM department, Pepsi-Cola determined that the most senior employees could bid on the positions within that department. Unfortunately for Cummins, he was sixth in seniority and he was unable to obtain the position of Refrigeration Technician, which would have allowed him to stay in Hazard. Instead, Cummins was placed in the Fountain Parts division, which was based in Pikeville.

Unhappy with the consolidation decision, Cummins filed a grievance, arguing that such consolidation violated his "territorial" and "seniority" rights. As Cummins' representative, the Union met with Pepsi-Cola on December 5, 1995. The Union representative, Earnest "Billy" Thompson (Thompson) argued Cummins' position that the consolidation violated the terms of the CBA. Pepsi-Cola disagreed with the Union's interpretation of the contract, but

agreed to deal with the situation at the negotiations for a new CBA in early 1996. Dissatisfied with the outcome, Cummins declined to take the Pikeville position and was laid-off.[1]

During his lay-off, Cummins remained in touch with both Pepsi-Cola and the Union. In fact, he eventually filed another grievance when he learned that an employee, Manual Arnett ("Arnett") who was working at the Hazard facility in Cummins' old position, had been transferred to the Pikeville facility, and another employee, Larry Damrell ("Damrell"), with less seniority than Cummins, had taken over Arnett's position in Hazard. Cummins also noticed that management employees were performing work at special events which bargaining unit employees, such as himself, were to perform. Based on this realization, Cummins filed another grievance, arguing that Pepsi-Cola was again violating the CBA by allowing management to perform such work.[2]

Pepsi-Cola and the Union met in regards to these grievances on June 12, 1996. Besides discussing these grievances, Cummins also complained that Arnett was not qualified to perform refrigeration work because he was not certified by the EPA. However, such complaint was not part of either of his grievances.

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[1] There is much dispute over whether Cummins was advised by Thompson to take the lay-off or to remain employed. However, such advice is not material to the resolution of this case.

[2] Notably, Cummins allegedly also filed a grievance in December of 1995, alleging that Pepsi-Cola "was bringing in daily personnel from Pikeville to do work Cummins was qualified to do at defendant company's Hazard plant." Plaintiff's amended Complaint at 18. However, both the Union and Pepsi-Cola deny ever receiving this complaint.

The meeting did not result in Cummins' grievances being rectified. Instead, Pepsi-Cola maintained that the transfer of Arnett and Damrell was appropriate and did not create any recall rights in Cummins. Moreover, Pepsi-Cola maintained that it had the right to use management employees when a bargaining unit employee could not perform the work. Pepsi-Cola did, however, agree that bargaining unit employees were to perform such work and offered Cummins the opportunity to perform such work on an "as needed" basis. Cummins declined.

At the meeting, Pepsi-Cola also stressed that Arnett was qualified for his position, but agreed that Arnett did need to be EPA certified to perform refrigeration work. Pepsi-Cola then noted that Arnett was getting certified. Because Cummins argued that Arnett needed additional training, as well as his EPA certification Pepsi-Cola agreed to look into whether more than just an EPA certification was required.

Upon adjournment of the meeting, Thompson asked Cummins for any documentation Cummins had in regards to further training being required, as well as EPA certification, in order to perform refrigeration work. Cummins, however, failed to provide such information. Moreover, Pepsi-Cola researched the issue, and determined that no further training was needed. Hence, Pepsi-Cola stated that it had adequately addressed Cummins concerns, but that it was not violating the CBA in any way.

Enclosing Pepsi-Cola's determination on whether additional training was required to perform refrigeration work, Thompson sent a letter to Cummins on July 26, 1996. In that letter, Thompson relayed that the Union had "made a good faith determination" to not take Cummins' grievances

to arbitration.

Upset that the Union would not take his grievances to arbitration and still believing that Pepsi-Cola had violated the CBA, Cummins filed this suit. He maintains that Pepsi-Cola breached the CBA by (1) "its actions causing separation of Cummins from his employment at the Hazard plant," (2) "having employees with less seniority come from other plants to do work at Hazard Cummins was qualified to do," and (3) "transferring to its Hazard facility an employee with less seniority than Cummins to do work at the Hazard facility which Cummins was and is qualified to do." Plaintiff's Amended Complaint at 29. He also maintains that the Union violated its duty of fair representation by acting arbitrarily and refusing and failing to prosecute his grievance further. Id. at 30.

Pepsi-Cola and the Union now move the Court for summary judgment. The defendants argue that Cummins initial grievances are time-barred by the six-month statute of limitations for hybrid section 301 cases. They also argue that Cummins has failed to show that the Union breached its duty to fairly represent Cummins. Lastly, Pepsi-Cola maintains that Cummins has failed to show that it breached the CBA.

Cummins has responded, arguing that genuine issues of material fact remain which preclude summary judgment. Cummins first argues that Pepsi-Cola breached the terms of the CBA by allowing Arnett and Damrell to be transferred into a position for more than one week. Cummins then contends that Arnett was not truly qualified, that EPA certification had been required before the merger occurred, and that Arnett did not receive any training when he was

transferred to Pikeville. Cummins further submits that because Arnett did not receive training, a vacancy was created when Arnett was transferred and he, Cummins, should have been placed in the position, not Damrell. Cummins additionally highlights that the Union should have known this and should have questioned Pepsi-Cola's facts and construction of the CBA. Thus, Cummins maintains that such issues of knowledge are for the fact-finder to decide and summary judgment cannot be granted.

The defendants reply, arguing that the factual issues that Cummins brings forth are not material. j Even assuming such facts are true, which they deny, the Union fairly represented Cummins. Moreover, Pepsi-Cola maintains that even if Arnett's transfer created a vacancy or Arnett was not qualified, Pepsi-Cola was not required to fill the position with Cummins; they could place an active employee in such position without violating the terms of the CBA.

CONCLUSIONS OF LAW

I. Cummins November and December of 1995 Grievances are Time-Barred

Under a hybrid section 301 claim, alleging breach of CBA and failure to fairly represent, a plaintiff must file an action within six-months of the time that the plaintiff is aware that the grievance will not be relieved. **Nida v. Plant Protection Ass'n Nat'l,** 7F.3d 522, 525 (6th Cir. 1993); **see also International Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Authority**, 108 F.3d 658, 663 (6th Cir. 1997); **Allgood v. Elyria United Methodist Home**, 904 F.2d 373, 376 (6th Cir. 1990). Thus, because his complaint was not filed until November 14, 1996, his November and

December [3] of 1995 grievances are time-barred. Interestingly, Cummins seems to concede this point as his response to the defendants' motions for summary judgment focuses solely on his May of 1996 complaint, in which he alleged that Pepsi-Cola (1) had placed a person with less experience in his position instead of recalling him and (2) was allowing management to work special events instead of him. [4]

II. CBA Was Not Breached and the Union Did Not Breach Its Duty Of Fair Representation

In order to sustain a claim under section 301, Cummins has to show both that Pepsi-Cola breached the CBA and that the Union failed to adequately represent him. **Black v. Ryder/P.I.E. Nationwide, Inc.,** 15 F.3d 573, 576 n.l & 583 (6th Cir. 1994). Cummins is unable to set forth a viable claim against Pepsi-Cola, much less against the Union. Accordingly, Cummins' hybrid section 301 claim fails. **See Ryan v. General Motors Corp.,** 929 F.2d 1105, 1109 (6th Cir. 1989).

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[3] Again it is unclear whether Cummins actually filed a grievance in December of 1995. Regardless, assuming he did, it would be timed-barred.

[4] Cummins has also backed off on the second part of his May of 1996 grievance. Cummins fails to take issue with Pepsi-Cola's decision as to management working special events. Instead, he focuses his response on his claim "that his right to be recalled to employment from lay-off was violated when the position, which he had held previously and for which he remained qualified, became vacant and Pepsi, instead of recalling [him], placed in the position an employee with less seniority." Plaintiff's Memorandum Contra Defendants' Motions For Summary Judgment at p. 1.

A. Pepsi-Cola Did Not Breach The CBA

Under the CBA, Pepsi-Cola's duty to recall Cummins only occurred when a position became open and Pepsi-Cola was looking to new hires to fill such position. The terms of the CBA are very explicit. Section 2 of Article IV of the CBA states:

> **It is agreed that an employee who is laid off shall he held on the Employer's waiting list for a period of one (1) year or a period equal to his length of service, whichever is less, and shall, while on the Employer's waiting list, be recalled before any new hires are made in his department.**

Under that section, the, it is clear that an employee's only reassurance is that he will be recalled before a new hire; the employee, however, is not assured that he will be recalled before another active employee is placed in a vacant position. Thus, even assuming Cummins' assertion that the Hazard refrigeration technician job became vacant because Arnett was not receiving the training he was supposed to be receiving, the CBA gave him no right to attain that spot over Damrell.

Moreover, whether Arnett was qualified for the position and whether transferring Arnett violated the one-week transfer provision is not material as to whether Cummins was entitled to such position. although it appears that Pepsi-Cola had the right to determine the qualifications of its employees and that the one-week transfer provision only dealt with salary, even assuming that Arnett was not qualified and that the one- week provision had been violalted, Cummins had no

standing to assert Arnett''s lack of qualification or a violation of the transfer provision.

First, Cummins had failed to initiate an actual grievance on either issue, **see Winston v. General Drivers, Warehousemen & Helpers,** 93 F.3d 251, 155 (6th Cir. 1996). Second, neither violation affected Cummins' employment since neither violation affected when he had the right to be recalled.

B. The Union Did Not Breach Its Duty Of Fair Representation

Assuming arguendo, however, that Pepsi-Cola did breach the CBA, Cummins' claim still fails; the Union has not breached its duty of fair representation. The record is replete with evidence of the Union's attempt to negotiate Cummins' grievances. The record clearly reflects that Thompson met with Pepsi-Cola about Cummins' May of 1996 complaint, and that Thompson argued that Cummins should be recalled if management employees were performing the work of bargaining unit employees. In fact, Thompson obtained a concession on such issue from Pepsi-Cola, as it agreed to recall Cummins to perform such work. Notably, however, because such special event work was sporadic in nature and was not full-time, Cummins declined.

The record further reflects that Thompson discussed Cummins' concerns about Arnett being transferred and not being certified. In fact, it is clear that Thompson, on Cummins' behalf encouraged Cummins to give him information that Arnett needed more than just an EPA

certification to be qualified. Cummins, however, failed to provide such information, and Pepsi-Cola submitted a letter that it had inquired into such and had been informed that an EPA certification was all that was needed.

Unfortunately, unlike with Cummins' management complaint, Pepsi-Cola did not concede on this issue. Instead, Pepsi-Cola maintained its belief that Cummins was not subject to recall, that Arnett was properly transferred for training purposes, and that Arnett was qualified. In turn on the basis of the
provided information, and on Thompson's reading of the recall clause, Thompson determined that Cummins' grievance should not be taken to arbitration.

Cummins now argues that the Union's decision was both arbitrary and improvident, especially in light of the evidence that Arnett did not actually receive any training in PIkeville and that certification had been required prior to the merger. Cummins contends that Union failed to investigate and bring to light such information. In so doing, them the Union failed to adequately represent him.

Although the Union is expected to "undertake reasonable investigation to defend a member_ [,]...[a] union does not... have to exhaust every possible remedy requested by a member ...." **Black,** 15 F.3d at 585. Further, it is not considered a breach of the union's duty, if the information it failed to uncover and present would not have "brought about a different decision." **Id.**

Essentially, in order for Cummins to prove that the Union violated its duty of fair representation, Cummins must show

that the Union acted in bad faith, discriminately, or arbitrarily; ordinary negligence or mistaken judgment is not enough. **See Linton v. United Parcel Service,** 15 f.3d 1365, 1372 (6th Cir. 1994). And, in order to prove that a union has acted arbitrarily, Cummins must show that "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 73 s.ct. 681, 686, 97 L.Ed. 1048 (1953), as to be irrational." **Air Line Pilot Ass'n Int'l v. O'Neill,** 499 U.S. 65, 111 s.ct. 1127, 1130 (1991).

Cummins has failed to set forth any facts which would evidence that the Union acted in bad faith or discriminately, **see Vaca v. Sipes,** 386 U.S. 171, 193-95 (1967); in fact Cummins complaint merely states that the Union's failure and refusal to prosecute his grievance was arbitrary. Plaintiff's complaint at 30. However, such is not the case.

Thompson's alleged failure to discern that Arnett had not received the training or that certification had previously been required prior to the merger would not have changed the outcome of this matter. **See Walk v. P*I*E* Nationwide, Inc.,**958 F.2d 1323, 1326-27 (6th Cir. 1992). Thompson, instead made his determination to not arbitrate the grievance on the basis that Arnett and Damrell were in the same department and that no vacancy had occurred. Since that decision was rational in light of the circumstances, the Union's refusal to arbitrate the grievance was not arbitrary. **See Nida,** 7 F.3d at 526, **Walk,**958 F.2d at 1326-1329. Thus, Cummins' claim that the Union breached its duty of adequate representation is meritless.

SUMMATION

In order to sustain a claim under his hybrid section 301/breach of fair representation action, Cummins had to show both that Pepsi-Cola breached the CBA and that the Union failed to adequately represent him. Because Cummins has been unable to show one of the requirements, much less both of the requirements, Cummins claim fails as a matter of law. As there is not genuine issue as to any material fact in this matter, the defendants are entitled to summary judgment. **See Ryan,** 929 F.2d at 1109.

Having so stated,
It is **ORDERED** herein:

(1) The defendants' motions for summary judgment (Record Nos. 57 & 60) be, the same hereby are, **GRANTED.**

(2) Having granted the motions for summary judgment, the recently filed motions in limine (Record NOs. 95 & 97), as well as any other pending motions, be and the same hereby are, **DENIED AS MOOT.**

(3) All scheduled proceedings, including the pre-trial conference, be, and the same hereby are, **CONTINUED GENERALLY.**

(4) There being no other outstanding issues to be decided in this case, this is a final and appealable order; a separate Judgment shall be entered herewith.

This the 18th day of February, 1998.

/s/ Joseph M. Hood, Judge

Date of Entry and Service: February 20, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 96-382

BRET CUMMINS,

PLAINTIFF,

V. **JUDGMENT**

PEPSI-COLA COMPANY, UNITED STEELWORKERS OF AMERICA, AND UNITED STEELWORKERS OF AMERICA UNION LOCAL NO. 12593

DEFENDANT.

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In conformity with the Memorandum Opinion and Order of even date,

IT IS ORDERED that this matter be, and the same hereby is, **DISMISSED WITH PREJUDICE** and **STRICKEN FROM THE COURT'S ACTIVE DOCKET.** The defendants are awarded costs pursuant to Fed. R. Civ. p. 54 (d). This is a final and appealable Order, and there is no just cause for delay.

This the 18 th day of February, 1998.

/s/ Joseph M. Hood, Judge

Date of Entry and Service: February 20, 1998